

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE WESTERN DISTRICT OF TEXAS

3 WACO DIVISION

4 EPISTAR CORPORATION,) (

5 PLAINTIFF,) (CIVIL ACTION NO.

6) (6:20-CV-420-ADA

7 VS.) (WACO, TEXAS

8) (

9 LOWE'S COMPANY, INC., ET AL.,) (JULY 26, 2021

10 DEFENDANTS.) (9:32 A.M.

11 MOTION HEARING

12 (BY ZOOM)

13 BEFORE THE HONORABLE JUDGE ALAN D ALBRIGHT

14 UNITED STATES DISTRICT JUDGE

15
16 FOR THE PLAINTIFF: Ms. Lucy Yen
17 Wilson Sonsini Goodrich & Rosati
18 1301 Avenue of the Americas
40th Floor
New York, NY 10019

19 Mr. Albert Shih
20 Wilson Sonsini Goodrich & Rosati
650 Page Mill Road
Palo Alto, CA 94304

21 COURT REPORTER: Ms. Shelly Holmes, CSR, TCRR
22 Certified Shorthand Reporter
23 2593 Myrtle Road
Diana, Texas 75640
24 (903) 720-6009
shellyholmes@hotmail.com

25 (Proceedings recorded by mechanical stenography, transcript
produced on a CAT system.)

1 FOR THE PLAINTIFF:

Ms. Celine Liu
Wilson Sonsini Goodrich & Rosati
1700 K Street NW
5th Floor
Washington, DC 20006

4 FOR THE DEFENDANTS:

Mr. Michael B. Eisenberg
Steptoe & Johnson LLP
1114 Avenue of the Americas
35th Floor
New York, NY 10036

Ms. Anna M. Targowska
Steptoe & Johnson LLP
227 West Monroe Street
Suite 4700
Chicago, IL 60606

10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

1 THE COURT: Good morning, it's Alan Albright. I'm
2 sorry. I had problems with my Zoom getting in, but --
3 Suzanne, if you'd call the case, please.

4 COURTROOM DEPUTY: Good morning, Judge.

5 Court calls Waco case 20-CV-420, Epistar
6 Corporation versus Lowe's Company, Inc., et al., for a
7 motion hearing.

8 THE COURT: If the parties would announce,
9 starting with the Plaintiff, please.

10 MS. YEN: Good morning, Your Honor. This is Lucy
11 Yen from Wilson Sonsini Goodrich & Rosati, representing
12 Epistar Corporation. On the line are two of my colleagues,
13 Albert Shih and Celine Liu.

14 THE COURT: Welcome all.
15 And for Defendant?

16 MR. EISENBERG: Good morning, Your Honor. This is
17 Michael Eisenberg at Steptoe & Johnson -- sorry -- on
18 behalf of Lowe's, the Defendant. With me on the line, I
19 believe I have Anna Targowska, also from Steptoe & Johnson.

20 THE COURT: Welcome to you guys, and I'm happy --
21 my law clerk has explained to me y'all had a couple of
22 issues with your scheduling. I'm happy to hear from either
23 side who wants to take these up, and we'll just work
24 through them together.

25 So I'm happy to hear from whoever wants to take

1 the lead.

2 MR. EISENBERG: This is Michael Eisenberg. Unless
3 the Plaintiff wants to go first, I think in large part, the
4 current issue is one raised by Defendant.

5 THE COURT: Okay. Happy to -- that certainly
6 works fine for me. Thank you, sir.

7 MR. EISENBERG: Thank you, Your Honor.

8 So the background here starts with the preliminary
9 infringement contentions. We spoke to Your Honor shortly
10 after those were filed -- were exchanged. And, you know,
11 at that time, there was a chart of a single product
12 provided and a general statement that there were other
13 products at issue.

14 We came to Your Honor at that time and said that
15 those disclosures were insufficient under the schedule and
16 Your Honor's order governing proceedings. We had a call
17 very similar to this one, and Your Honor said -- and
18 there's a transcript of this, obviously -- though not
19 ideal, there will be final infringement contentions and
20 further disclosures, and this issue will eventually work
21 its way correctly through the schedule.

22 On April 8th, the final infringement deadline came
23 and passed without any infringement contentions being
24 served.

25 On April 23rd, the Plaintiff served a motion to

1 Your Honor asking to supplement its infringement
2 contentions and stating that its request was -- this is a
3 quote -- timely.

4 Now, in Defendants' view, if you miss a deadline
5 in Your Honor's schedule, that is not timely, and that was
6 a false statement to Your Honor.

7 The supplemental contentions the Plaintiff
8 provided at that time provided six charts. Those charts do
9 not address the same accused products as each other. So
10 based on the charts as provided, different claims are
11 asserted against different products.

12 Despite serving six charts, Plaintiff referenced
13 but did not provide any specific disclosure for a total of,
14 I believe, 112 products. For all but those six, there is
15 no disclosure of which claims are at issue for any of those
16 112 products. And, in fact, it's not clear whether all
17 five patents at issue are asserted against those 112
18 products.

19 On June 3rd, Plaintiff filed a First Amended
20 Complaint and on June 30th submit -- disclosed its second
21 supplemental infringement contentions.

22 The second supplemental contentions include a
23 total of, I believe, 287 products. They are -- the same
24 six products from the first amended contentions are charted
25 again. In fact, they're the identical charts, so nothing

1 new was added in the charts, but more than a hundred
2 additional products were added at that time.

3 Again, based on Plaintiff's charts, it is not true
4 that all claims are -- all asserted claims are asserted
5 against all products.

6 All we have is a specific association between
7 asserted products and claims for six out of a total of 287
8 products.

9 We met and conferred on the schedule, and at that
10 time, even though these six charted products were in
11 Defendants' view untimely, Lowe's agreed that we would move
12 forward on those six products to effectively waive its
13 objection to the untimely nature of that disclosure and
14 accept those as timely and move forward with the case, the
15 only ones that have been charted and the only ones for
16 which any specific claims are asserted.

17 Plaintiff disagrees, and I'm sure you will hear
18 from opposing counsel explaining why they believe they
19 disagree.

20 But in Lowe's view, at this point, more than a
21 year after this suit was filed, the fact that there were --
22 that Plaintiff is refusing to tell Defendant which claims
23 are asserted against which products -- you know, let's
24 leave aside the point that, you know, not all 287 products
25 are charted. And I'm not necessarily saying that all

1 products have to be charted individually, but at a minimum,
2 they have to tell us which claims are asserted against
3 which products so we can determine the scope of what they
4 think is infringed and how they think it's infringed.

5 You know, even without the details in the chart,
6 we could do some digging and try to figure it out. But as
7 it is, we just have a list of 287 products and the
8 identification of specific claims that allegedly infringe
9 six of those products.

10 And it is Defendants' position that that is
11 inconsistent with the letter and spirit of what Your Honor
12 has ordered for all patent cases be provided. And it is
13 clear at this point that Plaintiff has no intention of
14 providing the disclosure that Lowe's believes should have
15 been provided more than a year ago.

16 THE COURT: I couldn't tell if you were done there
17 or not.

18 MR. EISENBERG: Oh, sorry, Your Honor, yes. And I
19 should have clarified that.

20 I think that is a descent summary of where I
21 understand things stand. Obviously, if Your Honor has any
22 questions for me, I would be glad to answer them.

23 THE COURT: No, I think I can -- I think I can
24 keep up with this so far.

25 Let me hear the Plaintiff's response.

1 MS. YEN: Thank you, Your Honor. This is Lucy
2 Yen.

3 First, I would just like to thank Your Honor for
4 promptly scheduling this hearing after the parties'
5 correspondence on Friday. We do seek the Court's guidance
6 in allowing this case to go forward, including setting a
7 case schedule.

8 Epistar has repeatedly stated to Lowe's that it's
9 willing to be very flexible on the schedule and to grant
10 Lowe's the time it requires to respond to the updated
11 infringement contentions.

12 The accused products in this case have been
13 identified since the preliminary infringement contentions.
14 They have not changed. They fall into six series of GE
15 light bulbs which we identified in August 2020.

16 It's -- it is true that we have identified
17 specific model and item numbers for the light bulbs that
18 fall into the six product series. That was done in part to
19 facilitate Lowe's search for discovery which Lowe's has
20 claimed it was not able to do, so Epistar scoured Lowe's
21 website, went into Lowe's stores to collect the item and
22 model numbers for light bulbs that fall into the six series
23 of products that were identified in August 2020.

24 With respect to the claim charts, it's obviously
25 impractical for Epistar to chart over 200 light bulbs.

1 We've charted a light bulb from each of those six product
2 series. We currently believe that those are representative
3 light bulbs, and the representative nature of those light
4 bulbs is precisely the analysis that our experts are
5 working on and they -- and will be the subject of expert
6 reports and will be the subject of expert deposition
7 testimony. And Lowe's will have adequate opportunity to
8 cross-examine our experts and to respond to the
9 representative nature of the light bulbs.

10 And if we don't --

11 THE COURT: Let me -- let me -- I'm sorry to
12 interrupt you.

13 Let me ask you this question. So you have -- I
14 get it. There are six -- six series. I get that so far.
15 And I'm sure counsel for Lowe's gets that, as well.

16 Have you -- have you taken it -- for the 200-plus
17 different light bulbs, have you told Lowe's -- for Light
18 Bulb No. 112, for example, have you told them which of the
19 six series of infringement -- have you divided each -- have
20 you divided and identified for each accused product which
21 of the six series it goes into at this time?

22 MS. YEN: The names of the light bulbs for the
23 most part identified the product series. The names of the
24 light bulbs are, for example, GE vintage 60-watt warm
25 candlelight. GE series is, of course, one of the series

1 that we identified in August 2020.

2 THE COURT: So I could look at -- if the Plaintiff
3 has accused a specific light bulb of infringing, I can look
4 at your infringement contentions and know which of the six
5 series of infringement -- of infringement you are
6 maintaining that light bulb falls under; is that correct?

7 MS. YEN: Yes, because our intention was to chart
8 at least one light bulb from each of the product series,
9 and each of the product --

10 THE COURT: I think we're missing each other.

11 What I -- I understand that you -- you charted six
12 and that they're representative. I think what the folks
13 from Lowe's are unhappy with is with 200 products, they
14 may not know which of the six series applies with respect
15 to each of the identified product which exceeds 200.

16 And counsel for Defendant can interrupt me if
17 I'm -- if I've misunderstood what the concern is, and the
18 concern may be even greater that they want charting of
19 infringement for each of the 200 done.

20 I'm just taking an intermediate step at this
21 point, and I'm trying to get from the Plaintiff, for each
22 of the 200-plus products, could I look at the -- could I
23 look at your contention and know for -- for Light Bulb No.
24 106 which of the six series of infringement it's covered
25 by?

1 MS. YEN: We believe you can.

2 THE COURT: And how would I do that?

3 MS. YEN: Because you would look at each part for
4 a GE vintage light bulb, and you would know that it is
5 Plaintiff's position that that claim chart is
6 representative of the other vintage light bulbs that have
7 been listed in the list of accused products.

8 THE COURT: Okay. So -- so the six -- are there
9 six buckets of light bulbs that are all relatively
10 identifiable based on the nomenclature of the way that
11 they're named?

12 MS. YEN: Yes.

13 THE COURT: Okay. And so -- and I think what you
14 just used -- one of the names you just used was "vintage."
15 So if -- if I am -- your -- Plaintiff's position is that
16 if -- that you have -- you have gone through and done an
17 infringement contention that shows to the Defendant why you
18 believe all of the -- of the, quote, unquote, vintage
19 nomenclatured light bulb -- you've done one representative
20 disclosure, but your position is, is that that disclosure
21 would cover all of the light bulbs that are -- have the
22 same nomenclature of vintage.

23 And so the Defendant is on notice of your
24 infringement theory for all of the light bulbs that fall in
25 that bucket? Is that a fair understanding on my part?

1 MS. YEN: Yes, it is. And it's our understanding
2 of the analysis to date, we have...

3 THE COURT: And are there any light bulbs in the
4 200 that don't have a nomenclature where there is a
5 representative light bulb that has been -- that -- for
6 which you have done an infringement analysis and shown --
7 and, you know, as required in my court, where you attach
8 each claim element to the product in a manner that shows
9 why you believe it infringes, is there -- are there any
10 products that -- that aren't covered where I -- where I
11 can't tell which claim -- which infringement contention
12 would cover it?

13 MS. YEN: Your Honor, I'm looking at the
14 descriptions we provided. I think there are a few in which
15 it may be difficult to know which of the six product
16 series, and we'd be happy to update the infringement
17 contentions to categorize them into one of the identified
18 product series.

19 THE COURT: Okay. Now, let me -- let me turn to
20 Defense counsel.

21 And -- and tell me -- I may be missing something
22 here. Tell me what I'm -- why that isn't satisfactory for
23 what we need the Plaintiff to do.

24 MR. EISENBERG: From Defendants' point of view,
25 and I think this is clear based on what counsel for

1 Plaintiff said earlier, they have not actually analyzed all
2 287 products, have not gone forward to try to figure out
3 whether all of the products within any given series are
4 actually materially the same.

5 Instead, they've said they've gone into stores to
6 look up --

7 THE COURT: Okay. Let -- I'm sorry to interrupt
8 you.

9 I'm going to make them do that for a hundred
10 percent of the products. So -- but what I'm concerned --
11 what I'm asking you now is, is assuming I require them
12 to -- for every product do what I just -- what I just
13 discussed, is it -- is it or is it not adequate? For
14 example, if they have -- if they have done a sufficient
15 infringement...

16 MR. EISENBERG: Sorry, Your Honor, you cut out
17 there -- or maybe my -- can you hear me?

18 THE COURT: -- nomenclature --

19 MR. EISENBERG: Sorry, Your Honor, you cut out
20 there for -- can you hear me? You cut out there for a
21 minute.

22 THE COURT: Okay. Let me try again.

23 So assuming they have to -- assuming the Plaintiff
24 is required for every product that they are accusing to
25 tell you which of the six -- they've done six

1 representative infringement contentions. If they have to
2 either, one, tell you the product -- I'm making this up --
3 Light Bulb No. 112, it falls under the -- the infringement
4 contention that we did for X product. And if they -- if it
5 doesn't -- if it's not captured, then they're going to have
6 to go back and do more work and give you an infringement
7 contention for it.

8 But my question to you is assuming that you get
9 infringement contentions for 100 percent of the products
10 and it's done in the manner I just suggested, does that
11 get -- does that satisfy you?

12 MR. EISENBERG: Well, I guess asking whether it
13 satisfies me, you know, we're -- we're more than a year
14 after suit was filed. There have been serious issues
15 throughout with how Plaintiff has conducted this
16 litigation. And the fact that we're still here and based
17 on what Plaintiff has said here today, it is my
18 understanding that they have not even yet looked at all 287
19 products.

20 They are hoping, wishing, believing that they will
21 fall within one of those six theories, but it should not be
22 the case that we are here today under those circumstances.
23 And if a Defendant were in a similar circumstance saying,
24 well, we'll get you what we think we should get you at some
25 point in the future, I just don't think it would fly.

1 And --

2 THE COURT: Well, maybe I'm -- maybe I'm missing
3 what you're asking me to do. Are you asking me to take
4 more serious action than just ordering them -- and you may
5 be, and if you are, I have to take that up.

6 But my understanding is that -- and maybe I was
7 misunderstood, that you're -- that you are obviously
8 concerned where you're at, but the point of my phone call
9 and the hearing was to resolve getting this issue done so
10 that you can move forward.

11 If Defendants' position is it's too late to do
12 that, then that's -- you're free to make that argument.
13 But that's not what I was prepared to hear today, and I
14 would probably have to take that up a little bit -- I'm
15 happy to take it up. That's just not what I was prepared
16 to -- what I thought I was going to do today was just try
17 and get this rectified and the train running down the track
18 and moving forward.

19 If you want more serious discipline, for lack of a
20 better word, I can't think of one, but if you want -- and I
21 don't think the word "sanction" is appropriate. But if you
22 want me to take stronger action than just setting a
23 deadline for when the Plaintiff will give you all of the --
24 all of the infringement contentions and identify them for
25 all products so that you can move forward, I'm going to

1 have to -- I'll have to do that in a different hearing.

2 So you just -- that's what I asked you earlier if
3 that would satisfy you, that's what I meant. I can do
4 that --

5 MR. EISENBERG: Oh, okay.

6 THE COURT: -- today. I can set a deadline. But
7 if you want me to do something more, that's entirely your
8 choice, but just let me know.

9 MR. EISENBERG: Okay. And I apologize, Your
10 Honor, if I wasn't -- if I wasn't clear.

11 I mean, there is a pending motion by the Plaintiff
12 to provide its untimely first amended infringement
13 contentions. That motion includes -- embedded within it a
14 question -- a request to provide its second supplemental
15 infringement contentions by June 30th. We have opposed
16 that. So that's all pending before Your Honor.

17 And it is Defendants' position -- and I want to be
18 as clear as possible here. They missed their deadline on
19 April 8th. They misinformed Your Honor that their
20 subsequent request was timely. And I do not think that
21 Defendant is in the position at this point of asking for
22 sanctions. That is something Your Honor could obviously
23 consider on your own.

24 But the primary point that Defendant wants to
25 raise is they should be held -- do the infringement

1 contentions that they did timely serve which themselves are
2 insufficient. And that -- that is Defendants' position,
3 and --

4 THE COURT: Okay.

5 MR. EISENBERG: -- based on what's been discussed
6 here today -- I'm sorry, Your Honor, go ahead.

7 THE COURT: No, no, no, I just said okay. I'm
8 getting to the point where I -- where I understand what
9 you're saying. You're welcome to continue.

10 MR. EISENBERG: Okay. The last thing that I was
11 going to mention is based on what's been discussed here
12 today, it appears to me that Plaintiff has admitted, and
13 they've done this in writing before and I think they've
14 done it again today, that they have not looked at all 287
15 products in detail enough to determine whether they're
16 representative.

17 And the fact that they repeatedly state that, as a
18 matter of fact, they are without actually having -- you
19 know, they're not saying on information and belief.
20 They're not saying we hope, we believe. They're stating as
21 a matter of fact a conclusion that they don't have a basis
22 put forward. And that is part of why they have not yet
23 disclosed, you know, the fact that these products are
24 allegedly identical within a series.

25 And I, Your Honor, have looked at personally --

1 not just through experts, but personally under microscopes
2 and otherwise, I have looked at the accused products within
3 a series, and they are not materially identical.

4 THE COURT: Okay. I'm -- I'm --

5 MS. YEN: May I --

6 THE COURT: I'm in much better shape
7 understanding your -- yeah, give me one second. I'm in a
8 much better shape of understanding what you're arguing.

9 And, yes, ma'am, I was about to say you're -- I
10 invite the Plaintiff to say anything they care to in
11 response.

12 MS. YEN: Thank you, Your Honor.

13 We did file a motion for leave on the supplemental
14 contentions. On April 8th, the day they were due, we sent
15 Plaintiff -- we sent Defendants the information that should
16 have been in a document called Final Infringement
17 Contentions. That was a mistake, and that is why we filed
18 a motion for leave before the Court.

19 On April 8th, Lowe's received the same information
20 that they should have received in the form of a document
21 for formal -- final infringement contentions.

22 We apologize for that. We filed a motion for
23 leave. We filed it two weeks after April 8th. That is
24 what we meant by timely.

25 We're not suggesting that the final infringement

1 contentions were served on April 8th. That is why we filed
2 a motion for leave before the Court.

3 On the accused products, it is also not true that
4 the 280 products have not been analyzed. Each of them have
5 been analyzed by our experts and by counsel at Wilson
6 Sonsini Goodrich & Rosati. Dozens of these light bulbs
7 were purchased from the store. The Lowe's website was
8 scoured to make sure that we had identified the correct
9 light bulbs. We looked for whatever specifications were
10 available on the Lowe's website.

11 We served a subpoena on the manufacturer of the
12 light bulbs. It's simply not true that we haven't done the
13 diligence. It's a hearing for another day, but part of the
14 issue is that we received no discovery from Lowe's in
15 response to any of our questions about their inventory.

16 So to the extent that not all of the accused
17 product model numbers have been identified immediately,
18 it's partly because the inventory on Lowe's website
19 changes. The availability of products changes. And we
20 have to spend the time going through the website and making
21 sure that we carefully identify light bulbs that are still
22 on sale and that are marketed as within the six product
23 series that we identified in August 2020.

24 Thank you.

25 THE COURT: Thank you, ma'am.

1 Anything else from -- from Lowe's?

2 MR. EISENBERG: I still -- I'm just a bit confused
3 by what Plaintiff's counsel just said.

4 I made a very specific statement, which is my
5 understanding is they have not analyzed all 287 products.
6 There's nothing confusing or subtle about that. It's not
7 about looking on a website. It's not -- you know, these
8 things are -- have been on sale either through the website
9 or in stores.

10 We didn't withdraw and drop in 287 new products
11 over the last couple of weeks. That's simply not what
12 happened. And Plaintiff's counsel should just admit that
13 they have not done the same analysis on all 287 products.
14 It's not difficult or confusing.

15 And there seems to be some misunderstanding
16 between the parties on what's -- what's going on here,
17 which is you're supposed to do your analysis to know what's
18 at issue before you file suit. Yes, you can supplement as
19 necessary. But that's not what happened, and it's still
20 not what's happened to this date.

21 And if -- one last clarification, Your Honor. We
22 had discovery requests to Plaintiff for all their analysis,
23 which are not privileged. You know, they relied upon them
24 for their infringement contentions. I have personally gone
25 through their discovery responses, and I have found

1 analyses for approximately six products, not 287.

2 And that is not where we should be a year after
3 filing suit. And talking about what's available in images
4 on a website doesn't answer that question.

5 THE COURT: I got it.

6 Anything else from the Plaintiff?

7 MS. YEN: Thank you, Your Honor. I feel like
8 we're two ships passing in the night.

9 I can't state more expressly that we've analyzed,
10 including our experts, carefully analyzed each of the light
11 bulbs we identified as an accused product before we listed
12 them.

13 It will be the subject of expert discovery, and
14 Lowe's will have every opportunity to cross-examine our
15 experts regarding that analysis, the nature of the
16 representativeness, and other conclusions made by our
17 experts.

18 THE COURT: Okay. Anything else from anyone?

19 MR. EISENBERG: Not from Defendants' side, Your
20 Honor.

21 THE COURT: Well, thank you for your time this
22 morning.

23 My law clerk and I are -- you may be able to hear
24 the background noise. We are headed to beautiful Del Rio
25 to -- you may have missed it, but there's been some issues

1 with immigration over the past couple of months that we're
2 going to go help out with. But -- and so he and I are
3 going to be in Del Reo for this week.

4 But we'll be able to get something out in the next
5 day or so to -- I think, to resolve this. And we'll --
6 we'll -- look in your email, and we'll get something in the
7 very near future taking care of this.

8 Does anyone else have anything else they'd like to
9 say?

10 MS. YEN: No. Thank you, Your Honor. Again,
11 thank you for making time today to help us get the case
12 going.

13 THE COURT: Happy to do it. You guys have a good
14 afternoon, and we'll get this worked out quickly. Thank
15 you.

16 MR. EISENBERG: Okay. Safe travels.

17 (Hearing concluded at 10:01 a.m.)
18
19
20
21
22
23
24
25

CERTIFICATION

I HEREBY CERTIFY that the foregoing is a true and correct transcript from the stenographic notes of the proceedings in the above-entitled matter to the best of my ability.

/S/ Shelly Holmes
SHELLY HOLMES, CSR, TCRR
OFFICIAL REPORTER
State of Texas No.: 7804
Expiration Date: 10/31/21

8/3/21
Date